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Supreme Court, U.S.
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No. 93-901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM D. WEST,
Cross-Petitioner,

v.

NORTHWEST AIRLINES, INC.,
Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR CROSS-PETITIONER

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December 1993

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Pursuant to Rule 15.7, cross-petitioner William D. West hereby advises the Court of a recent decision by the Illinois Supreme Court which was issued nine days after the filing of his cross-petition. As we explain below, this decision by a state supreme court conflicts with the court of appeals' ruling in this case over the issue of whether the Federal Aviation Act preempts an airline passenger's claim for punitive damages. The decision thus provides an additional reason to grant review of the cross-petition if the Court should decide to grant Northwest's petition.

In *Wolens v. American Airlines, Inc.*, 1993 WL 518593 (Ill. 16 December 1993), the Illinois Supreme Court held that section 105 of the Federal Aviation Act does not preempt a passenger's claims

against an airline for breach of contract and violation of Illinois' Consumer Fraud and Deceptive Business Practices Act, based on American's retroactive change in the rules for earning mileage credits in its frequent flyer program. The suit, filed as a class action, sought compensatory and punitive damages, as well as an injunction on behalf of the class to prevent application of the new rules to mileage credits earned prior to May 1988. Slip op. at 1.

American moved to dismiss the suit on the ground that section 105 preempted these claims. The trial court denied the motion, but certified that legal question to the Illinois Court of Appeals, which held that section 105 does preempt the request for injunctive relief, though not the damages claims. 207 Ill. App. 3d 35, 152 Ill. Dec. 16, 565 N.E.2d 258 (1990). The Illinois Supreme Court affirmed that ruling. 147 Ill. 2d 367, 168 Ill. Dec. 133, 589 N.E.2d 533 (1992). American then sought review in this Court, which granted the petition, vacated the judgment and remanded for further consideration in light of this Court's decision in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). *American Airlines, Inc. v. Wolens*, 113 S. Ct. 32 (1992).

In its recent decision on remand, the Illinois Supreme Court held that the damages claims could proceed notwithstanding *Morales*, reasoning that both the common law and statutory claims, insofar as they affected American's frequent flyer program, had too "tenuous, remote, or peripheral" an effect on American's "rates, routes, or services" to be preempted by section 105. *Morales, supra*, 112 S. Ct. at 2040 (internal quotation omitted). Slip op. at 3-5. The court went on to add that retroactive changes to the terms of an airline's frequent flyer program would constitute a breach of contract under Illinois law. Slip op. at 4.

The *Wolens* court did not discuss whether, for purposes of considering American's preemption defense, the passenger's claim for actual damages might stand on a separate footing from the claim for punitive damages, as the Ninth Circuit did in the present case. Indeed, the fact that the passenger was seeking punitive damages was cited only by the one dissenting Justice, slip op. at 8, 9, who would have held that both the statutory and common law claims are preempted under *Morales*. Slip op. at 8-11.

We respectfully submit that the *Wolens* decision, which reached

a different result on the punitive damages issue than did the court of appeals here, strengthens our argument for granting the cross-petition if the Court is inclined to grant Northwest's petition on the compensatory damages issue.

CONCLUSION

If the petition in No. 93-803 is granted, this cross-petition should also be granted.

Respectfully submitted,

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